138 FERC ¶ 61,111
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
and Cheryl A. LaFleur.

Duquesne Light Company	Docket Nos.	ER08-194-000 ER08-194-001 ER08-194-002 ER08-194-003 ER08-194-004
Midwest Independent Transmission System Operator, Inc. and Duquesne Light Company	Docket Nos.	ER08-1235-000 ER08-1235-001
Midwest Independent Transmission System Operator, Inc. and Duquesne Light Company	Docket No.	ER08-1309-000
PJM Interconnection, L.L.C.	Docket Nos.	ER08-1339-000 ER08-1339-001 ER08-1339-002
PJM Interconnection, L.L.C.	Docket Nos.	ER08-1345-000 ER08-1345-001 ER08-1345-002
Midwest Independent Transmission System Operator, Inc. and Duquesne Light Company	Docket No.	ER08-1370-000

ORDER ON BREACH OF CONTRACT CLAIM AND ESTABLISHING HEARING AND SETTLEMENT JUDGE PROCEDURES

(Issued February 16, 2012)

1. This case comes to us from the United States District Court for the Southern District of Indiana (District Court), and pertains to a breach of contract claim filed by Midwest Independent Transmission System Operator, Inc. (MISO) against Duquesne

Light Company (Duquesne).[1] In this order, we find that: (1) Duquesne's execution of the Agreement of Transmission Facilities Owners to Organize the Midwest Independent Transmission System Operator, Inc., a Delaware Non-Stock Corporation (Transmission Owners Agreement) created a binding commitment to MISO; and (2) Article Five of the Transmission Owners Agreement obligates Duquesne to pay an exit fee. We also establish hearing and settlement judge procedures to determine what a just and reasonable exit fee would be under the circumstances of this case.

I. Background

2. On November 8, 2007, Duquesne filed with the Commission a petition requesting approval to withdraw from membership in PJM Interconnection, L.L.C. (PJM). Duquesne conditioned its proposed withdrawal on the Commission's approval of Duquesne joining MISO, MISO's implementation of a centralized energy balancing program by a date certain, and MISO's submission to the Commission of an integration filing. The Commission approved Duquesne's conditional petition to withdraw from PJM, but conditioned its approval on certain requirements of Duquesne. One of those requirements was that Duquesne satisfy any contractual requirements for withdrawal that it had with PJM and that such satisfaction be found just and reasonable by the Commission.[2]

3. On July 3, 2008, Duquesne and MISO filed a transmission integration plan that would govern the orderly transition of Duquesne's transmission assets from PJM to MISO. The filing noted that the parties had issues they still needed to resolve, including the Commission's final determination on Duquesne's liabilities to PJM. Several parties submitted comments on this joint filing, to which Duquesne and MISO filed a joint answer on August 8, 2008. This response reiterated that Duquesne still needed the Commission to resolve several important issues to decide whether integrating into MISO was in its economic best interests. The Commission conditionally accepted the transmission integration plan on September 3, 2008.[3] On August 6, 2008, Duquesne submitted to MISO its signed application for membership along with the $15,000 membership fee and several other documents, including the executed signature sheets of the Transmission Owners Agreement, necessary for Duquesne to become a transmission-owning member of MISO. In the transmittal email containing the signature sheets,

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[1] *Midwest Indep. Transmission Sys. Operator, Inc. v. Duquesne Light Co.*, No. 1:09-cv-1289-TWP-DML.

[2] *Duquesne Light Co.*, 122 FERC ¶ 61,039 (2008).

[3] *Duquesne Light Co.*, 124 FERC ¶ 61,219 (2008) (September 3 Order).

Duquesne stated: "the effectiveness of this execution and our joining these agreements is contingent upon Duquesne receiving acceptable regulatory approvals on the withdrawal from PJM and the joining of [MISO]."

4. On August 21, 2008, the MISO Board of Directors unanimously approved Duquesne's application for membership in MISO. Subsequent meetings were held to begin the process of integrating Duquesne into MISO. However, on November 4, 2008, Duquesne sent MISO a copy of a draft settlement agreement between Duquesne and PJM wherein Duquesne agreed to remain a member of PJM for an additional five years. In the settlement agreement, Duquesne sought to withdraw from the Commission's consideration its prior request to withdraw from PJM and establish membership in MISO. On December 10, 2008, Duquesne, PJM and fifteen other parties filed the settlement agreement with the Commission seeking approval of the settlement.

5. MISO objected to the settlement, claimed that Duquesne was contractually committed to remain a member of MISO for five years, and requested an exit fee for Duquesne's premature withdrawal.[4] On January 29, 2009, the Commission accepted the settlement agreement. As to MISO's objections, the Commission held:

> We . . . find that the terms pursuant to which Duquesne will be permitted to terminate its obligations to [MISO], including Duquesne's obligation to pay financial obligations incurred prior to the effective date of its withdrawal from the [Transmission Owners Agreement], raise issues that cannot be resolved summarily in this proceeding. These issues are not addressed by the Settlement Agreement. Accordingly, [MISO] or other affected parties may make a separate filing in a new proceeding raising these issues, or they may pursue these issues in an appropriate judicial forum.[5]

6. Nine months later, MISO filed an action in the District Court, alleging breach of contract and promissory estoppel and demanding a jury trial. Duquesne filed a motion to stay, and asked the District Court to refer the breach of contract action to the Commission. Duquesne argued that MISO's claim required interpretation of the Commission's prior orders and the Transmission Owners Agreement, and thereby

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[4] MISO estimated the exit fee to be $7.1 million based upon the *Louisville Gas and Electric Co.* formula. *See Louisville Gas & Elec. Co.*, 114 FERC ¶ 61,282, *order on reh'g sub nom. E.ON U.S. LLC*, 116 FERC ¶ 61,020 (2006) (*Louisville Gas and Electric*).

[5] *Duquesne Light Co.*, 126 FERC ¶ 61,074, at P 33, *reh'g denied*, 127 FERC ¶ 61,186 (2009).

warranted referral to the Commission under the primary jurisdiction doctrine. Duquesne also noted to the District Court that should it determine that Duquesne had an obligation to pay an exit fee, the Commission would have exclusive jurisdiction to assess what amount would be just and reasonable.

7. On July 12, 2010, the District Court granted Duquesne's motion to stay. In the order granting the motion to stay, the District Court found that:

> [The Commission's] superior knowledge, both substantive and historical with respect to the factual circumstances, its expertise in interpretation of [transmission owners] agreements and exit fee prerequisites, along with the public policy interest in consistency and uniformity in the regulation of this industry, requires us to withhold our review of these matters until the [Commission] can weigh in on what it deems appropriate under these circumstances with which it is entirely familiar. This is truly a case where the expertise and experience of the [Commission] is too great for a court to waive-off and attempt to duplicate on its own.[6]

On August 13, 2010, the District Court entered an order directing MISO to seek the Commission's opinion on the following issues regarding the breach of contract claim:

> A. In light of the circumstances presented in this case, did Duquesne's execution of the [Transmission Owners] Agreement create a binding commitment to [MISO]?
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> If the answer is "no," then the Commission need not proceed further.
>
> B. If the answer to the above question is yes, is Duquesne obligated to pay the withdrawal fee specified in Article Five of the Transmission Owners Agreement upon its withdrawal?
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> If the answer is "no," then the Commission need not proceed further.
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> C. If the answer to the above question is yes, what is a just and reasonable exit fee under the circumstances of this case?[7]

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[6] *Midwest Indep. Transmission Sys. Operator, Inc. v. Duquesne Light Co.*, No. 1:09-cv-1289-TWP-DML at 8 (S.D. Ind. Jul. 12, 2010).

[7] *Midwest Indep. Transmission Sys. Operator, Inc. v. Duquesne Light Co.*, No. 1:09-cv-1289-TWP-DML at 1-2 (S.D. Ind. Aug. 13, 2010).

8. On October 12, 2010, MISO filed a motion requesting that the Commission establish procedures to respond to the District Court's request. To aid the Commission in responding to the District Court's questions, as well as to afford the parties an opportunity to submit legal arguments that address the issues presented by the District Court, the Commission established briefing procedures.[8] Pursuant to the Order Establishing Briefing Procedures, MISO, MISO Transmission Owners,[9] Duquesne, and FirstEnergy Service Company (FirstEnergy),[10] submitted initial briefs, and MISO, MISO Transmission Owners, and Duquesne submitted reply briefs.

[8] *Duquesne Light Co.*, 135 FERC ¶ 61,237, at P 7 (2011) (Order Establishing Briefing Procedures).

[9] MISO Transmission Owners for this filing consist of: Ameren Services Company, as agent for Union Electric Company d/b/a Ameren Missouri, Ameren Illinois Company d/b/a Ameren Illinois and Ameren Transmission Company of Illinois; American Transmission Company LLC; Big Rivers Electric Corporation; Central Minnesota Municipal Power Agency; City Water, Light & Power (Springfield, IL); Dairyland Power Cooperative; Duke Energy Corporation for Duke Energy Ohio, Inc., Duke Energy Indiana, Inc., and Duke Energy Kentucky, Inc.; Great River Energy; Hoosier Energy Rural Electric Cooperative, Inc.; Indiana Municipal Power Agency; Indianapolis Power & Light Company; International Transmission Company d/b/a ITC Transmission; ITC Midwest LLC; Michigan Electric Transmission Company, LLC; Michigan Public Power Agency; MidAmerican Energy Company; Minnesota Power (and its subsidiary Superior Water, L&P); Montana-Dakota Utilities Co.; Northern Indiana Public Service Company; Northern States Power Company, a Minnesota corporation, and Northern States Power Company, a Wisconsin corporation, subsidiaries of Xcel Energy Inc.; Northwestern Wisconsin Electric Company; Otter Tail Power Company; Southern Illinois Power Cooperative; Southern Indiana Gas & Electric Company (d/b/a Vectren Energy Delivery of Indiana); Southern Minnesota Municipal Power Agency; Wabash Valley Power Association, Inc.; and Wolverine Power Supply Cooperative, Inc.

[10] In its brief, FirstEnergy states that it does not take a position on the specific details at issue here. FirstEnergy asserts that the Commission is obligated to make its findings on these issues consistent with the express provisions of the Transmission Owners Agreement that govern them. FirstEnergy notes that the Transmission Owners Agreement is a rate schedule filed with the Commission, and that under the filed rate doctrine, the only charges that may be assessed pursuant to a rate schedule on file with the Commission are those charges expressly authorized in the rate schedule. Therefore, FirstEnergy concludes, the filed rate doctrine precludes any party in these proceedings

(continued…)

II. Discussion

9. Membership in regional transmission organizations (RTO) such as MISO and PJM is voluntary; the Commission does not mandate membership. While it is not possible to physically integrate the same transmission facilities into more than one RTO, this case demonstrates that it is possible for a transmission owner to contractually commit its facilities to more than one such organization. Under these circumstances, in which Duquesne sought first to leave PJM and join MISO, and then abandoned those plans in order to remain in PJM, Duquesne appears to have committed itself to integrate its facilities with both PJM and MISO. As discussed below, Duquesne relies on the Commission's conditional acceptance of its integration plan to indicate that its contract with MISO is not binding;[11] however, the Commission's conditional acceptance of the Duquesne/MISO integration plan only relates to their plan to integrate the physical transmission facilities into MISO and has no bearing on Duquesne's decision to join MISO as a transmission owning member. In fact, Duquesne has remained at all times physically integrated with PJM, and so we focus here on the repercussions of its apparent commitment to MISO.

A. Execution of the Transmission Owners Agreement

1. Initial Briefs

a. MISO and MISO Transmission Owners

10. In their initial briefs, MISO and MISO Transmission Owners argue that a valid contract exists between MISO and Duquesne. According to MISO, Duquesne executed the Transmission Owners Agreement without condition and thus became contractually bound at the time of execution.

11. MISO and MISO Transmission Owners state that Article Nine, section B of the Transmission Owners Agreement establishes that Delaware law governs the

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from claiming a legal right that violates the express provisions of the Transmission Owners Agreement, and precludes the Commission from deviating from or modifying the express provisions of the Transmission Owners Agreement without making the specific findings required under section 206 of the Federal Power Act (FPA), 16 U.S.C. § 824e (2006). FirstEnergy Initial Brief at 2-3.

[11] *See* Duquesne Reply Brief at 7-9 (citing September 3 Order, 124 FERC ¶ 61,219).

interpretation of the Transmission Owners Agreement.[12] MISO states that under Delaware law, an unambiguous contract creates binding obligations.[13] MISO explains that "a contract is 'clear' and 'unambiguous' when its terms 'establish the parties' common meaning so that a reasonable person in the position of either party would have no expectations inconsistent with the contract language.'"[14] MISO further explains that to make a binding agreement, at least as applied to a written contract, the agreement must be executed in due form, and an unambiguous agreement controls the rights of the parties, unaffected by contentions of one of the parties that he, or she, or it meant something else. MISO also asserts that clauses or conditions are unenforceable where they are contained in an unexecuted delivery certificate, and not contained in the underlying contract.[15]

12. MISO and MISO Transmission Owners argue that the terms of the Transmission Owners Agreement are clear and unambiguous; therefore, the Commission should not use extrinsic evidence, or evidence outside the contract, to interpret the Transmission Owners Agreement.[16] They argue that Duquesne's statements of conditionality, including the transmittal email, are extrinsic to the Transmission Owners Agreement and, therefore, the Commission should not consider this evidence to interpret the intent of the agreement.

13. Additionally, MISO and MISO Transmission Owners argue that the merger clause in Article Nine, section L of the Transmission Owners Agreement extinguished any prior

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[12] Article Nine, section B of the Transmission Owners Agreement provides that "[t]his Agreement shall be interpreted, construed, and governed by the laws of the State of Delaware, except to the extent preempted by the laws of the United States of America."

[13] MISO Initial Brief at 8 (citing *Majkowski v. Am. Imaging Mgmt. Servs., LLC*, 913 A.2d 572, 581 (Del. Ch. 2006) (internal citations omitted)).

[14] *Id.* (quoting *Eagle Industries, Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997) (internal citations omitted)).

[15] *Id.* at 9 (citing *Alliance Corp. v. L.M. Cottrell Const. Co.*, 674 F. Supp. 3 (S.D.N.Y. 1987)).

[16] *Id.* at 5-9; MISO Transmission Owners Initial Brief at 10-11 (citing *Transmission Agency of N. Cal. v. FERC*, 628 F.3d 538, 547 (D.C. Cir. 2010); *Pac. Gas & Elec. Co.*, 107 FERC ¶ 61,154, at P 19 (2004); *Mid-Continent Area Power Pool*, 92 FERC ¶ 61,229, at 61,755 (2000); *Pellaton v. Bank of N.Y.*, 592 A.2d 473, 478 (Del. 1991); *Spellman v. Katz*, 2009 Del. Ch. LEXIS 18, at *8-9 (Del. Ch. 2009)).

or contemporaneous conditions or reservations that Duquesne did not include in the Transmission Owners Agreement.[17] MISO Transmission Owners state that the agreement is clear that any modifications to the Transmission Owners Agreement must be in writing and made part of the Transmission Owners Agreement or other referenced documents. According to MISO Transmission Owners, there are no written amendments to the Transmission Owners Agreement that state that Duquesne's execution was conditional and, therefore, the agreement remains unconditional.[18] Further, MISO claims that in executing the Transmission Owners Agreement, Duquesne did not carry forward any of its regulatory reservations as contract conditions. MISO explains that those conditions were either favorably resolved in favor of Duquesne, or were considered by Duquesne for nearly eight months before Duquesne executed the Transmission Owners Agreement. MISO further argues that regulatory context, and the conditional nature of Duquesne's regulatory application, do not create an ambiguity in a contract in which none exists, nor does it create an excuse for non-performance.[19]

b. Duquesne

14. Duquesne argues that its execution of the Transmission Owners Agreement did not create a binding commitment to MISO, because the execution was conditional. Duquesne argues that it consistently reserved the right not to proceed with the switch from PJM to MISO should circumstances lead Duquesne to conclude that a switch was not in the best interests of itself and its customers. Duquesne states that it included this condition in its transmittal email to which it attached the executed signature sheets of the Transmission Owners Agreement. Duquesne also notes that MISO joined Duquesne's July 3, 2008 and August 8, 2008 filings with the Commission, both of which indicated that Duquesne's decision to join MISO had not been finalized.[20] Duquesne argues that

[17] Article Nine, section L of the Transmission Owners Agreement (merger clause) provides that "[t]his Agreement . . . constitute[s] the entire agreement among the Owners with respect to the subject matter of this Agreement, and no previous or contemporary oral or written representations, agreements, or understandings made . . . shall be binding on any Owner unless contained in this Agreement."

[18] MISO Transmission Owners Brief at 12-13.

[19] MISO Initial Brief at 10.

[20] Duquesne Initial Brief at 9-10.

MISO cannot now reverse itself and argue that Duquesne's execution of the Transmission Owners Agreement had legal significance.[21]

15. Duquesne also argues that it never became a member of MISO, because Duquesne never left PJM. According to Duquesne, it would be legally impossible for Duquesne to simultaneously be a member of both PJM and MISO because MISO would not have had exclusive and independent authority over the rates, terms and conditions of service using Duquesne's transmission assets.[22]

2. Reply Briefs

a. MISO and MISO Transmission Owners

16. MISO and the MISO Transmission Owners contend that all of the prior conditions and the email cover letters' disclaimers cited by Duquesne are a legal nullity. As argued previously, MISO and MISO Transmission Owners state that the Transmission Owners Agreement contains a merger clause that extinguishes all prior and contemporaneous matters not set forth in the contract. Further, MISO argues that the contemporaneous disclaimer (i.e., the transmittal email) is neither in the form, the substance, nor the execution that Delaware law would recognize as a valid condition to contract formation.[23] MISO also includes testimony from Mr. Stephen G. Kozey, MISO's Vice President, General Counsel, and Secretary, claiming that he had no knowledge of the condition and would not have accepted it if he had been aware of it.[24] Further, MISO Transmission Owners argue that under the filed rate doctrine, the Commission-approved terms of the Transmission Owners Agreement establish and control the parties' obligations under the Transmission Owners Agreement that cannot be modified without obtaining Commission approval. MISO Transmission Owners argue that if Duquesne

[21] *Id.* at 11 (citing *Liberty Property Trust v. Day-Timers, Inc.*, 815 A.2d 1045, 1052 (Pa. Super. Ct. 2003); *Heredia v. Sandler*, 605 N.E.2d 1212, 1217 (Ind. Ct. App. 1993)).

[22] *Id.* (quoting 18 C.F.R. § 35.34(j)(1)(iii) (2010)).

[23] MISO Reply Brief at 3; MISO Transmission Owners Reply Brief at 5-9.

[24] MISO Reply Brief, Attachment I (Kozey Test.) at 3-4.

wished to amend the Transmission Owners Agreement, it should have submitted the necessary filings under section 205 or 206 of the FPA.[25]

17. MISO also argues that since there was no pressing reason for Duquesne to execute the Transmission Owners Agreement, Duquesne had the option of waiting until any concerns it had were resolved before submitting the signature pages to MISO. MISO contends that because Duquesne indicated a desire to receive approval of its membership application from the MISO Board of Directors at the August 21, 2008 meeting, MISO interpreted Duquesne's actions to mean that Duquesne had a firm intent to join MISO. In MISO's view, Duquesne understood that some details had not been settled, but was willing to move forward.[26]

18. With regard to regulatory issues, MISO argues that Duquesne's July 3, 2008 filing with the Commission included reservations; however, read in its entirety, the document gives the impression of an entity fully committed to its publicly-announced course of action. MISO contends, however, that Duquesne cannot rely on a regulatory record to obviate its contractual obligation to MISO, which occurred once Duquesne executed the Transmission Owners Agreement.[27] Further, MISO claims that the lack of final Commission approval is entirely the fault of Duquesne for breaching its obligation to work in good faith to perfect its regulatory filings. MISO also argues that by continuing to negotiate with PJM for a better deal after signing the Transmission Owners Agreement, Duquesne failed to act in good faith.[28]

19. Finally, MISO and MISO Transmission Owners state that Duquesne's reliance on Pennsylvania law is misplaced because the Transmission Owners Agreement is unambiguous as to choice of law. They state that the Transmission Owners Agreement provides that Delaware law governs and, therefore, Pennsylvania law is irrelevant.[29]

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[25] MISO Transmission Owners Reply Brief at 7-8. (citing *AT&T v. Cent. Office Tel., Inc.*, 524 U.S. 214, 222-24 (1998); *Cargill Power Mkts., LLC v. Pub. Serv. Co. of N.M.*, 132 FERC ¶ 61,079, at P 22 and n.16 (2010); *City of Vernon, Cal.*, 115 FERC ¶ 61,297, at P 37 and n.41 (2006)).

[26] MISO Reply Brief at 7-9.

[27] *Id.* at 10 (citing *Morgan Stanley Capitol Group, Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527 (2008)).

[28] *Id.* at 11-13.

[29] *Id.* at 6; MISO Transmission Owners Reply Brief at 8-9.

b. Duquesne

20. In its reply brief, Duquesne argues that it advised MISO in writing that its execution of the Transmission Owners Agreement was conditional. According to Duquesne, Duquesne would have noted the conditional language contained in the transmittal email on the signature pages of the Transmission Owners Agreement had MISO not objected. Duquesne claims that MISO took the position that the signature pages were tariffs, and that placing any type of writing on the page would constitute an impermissible change to the tariff.[30]

21. Duquesne also argues that the parol evidence rule and the merger clause in the Transmission Owners Agreement are irrelevant here, because the issue is not what the terms of the agreement are. Rather, Duquesne argues that the contested issue is whether Duquesne even entered into an agreement.[31] In particular, Duquesne argues that its acceptance of the Transmission Owners Agreement was conditional and "[i]t is an elementary principle of contract law that an acceptance of an offer, in order to be effectual, must be identical with the offer and unconditional."[32] Because Duquesne asserts that it never entered into an enforceable contract with MISO, neither the parol evidence rule nor the merger clause in the Transmission Owners Agreement justifies exclusion of the transmittal email. Duquesne argues that a different principle of contract law applies – that contemporaneous documents that are part of the same transaction are to be interpreted in tandem, not in isolation. According to Duquesne, contract law rejects the notion advanced by MISO Transmission Owners that the Transmission Owners Agreement signature pages should be read in isolation, to the exclusion of the transmittal email and the myriad other documents that Duquesne did not sign, when evaluating whether Duquesne had made a binding promise to join MISO.[33]

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[30] Duquesne Reply Brief at 4; *see also id.* Exhibit 4 (Jack Test.) at P 6.

[31] Duquesne Reply Brief at 4-5 (quoting *Hynansky v. Vietri*, 2003 WL 21976031, *3 (Del. Ch. 2003) ("The operation of the parol evidence rule is premised upon a showing of the existence of an enforceable written contract.")).

[32] *Id.* at 3 (quoting *Friel v. Jones*, 206 A.2d 232, 233-34 (Del Ch. 1964), *aff'd*, 212 A.2d 609 (Del. 1965)).

[33] *Id.* at 5-6 (citing *Simon v. Navellier Series Fund*, 2000 WL 1597890, at *7 & n.33 (Del. Ch. 2000); *Segovia v. Equities First Holdings, LLC*, 2008 WL 2251218, at *9 (Del. Super Ct. 2008)).

22. Duquesne argues that MISO recognized that Duquesne had not fully committed to joining MISO, as evidenced by the joint filing made by Duquesne and MISO on August 8, 2008, several days after Duquesne had submitted the executed Transmission Owners Agreement. Duquesne notes that this filing included several statements stressing the fact that Duquesne had not made a final decision to join MISO.[34]

23. Duquesne also claims that the Commission's September 3, 2008 order did not characterize Duquesne as having committed to join MISO.[35] Duquesne explains that the Commission "conditioned its acceptance of the Duquesne/[MISO] integration plan on the submission of additional filings by Duquesne and/or [MISO], as well as a firm commitment, on the part of Duquesne, to withdraw from PJM."[36] Duquesne points to other places in the September 3 Order where the Commission referred to the conditional nature of Duquesne's application to join MISO. Further, Duquesne argues that the regulatory conditions MISO claims were resolved remained, in fact, unresolved.[37]

3. Commission Determination

24. We find that the Transmission Owners Agreement executed by Duquesne is unconditional and that, by executing the agreement, Duquesne entered into a binding commitment. Because the Transmission Owners Agreement is explicit on this point, the parol evidence rule and the merger clause of the Transmission Owners Agreement preclude the Commission from considering the transmittal email to contradict the terms of the agreement.

25. As a threshold matter, the terms of the Transmission Owners Agreement establish that Delaware law governs the rights and obligations of the parties to the Transmission Owners Agreement.[38] Delaware law provides that the Commission must construe the Transmission Owners Agreement as it is made by the parties themselves, and to give language that is "clear, simple and unambiguous the force and effect which the language

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[34] *Id.* at 6-7 (citing MISO and Duquesne, Response to Protest and Requests for Relief, Docket No. ER08-1235-000, at 7-8 (filed Aug. 8, 2008)).

[35] *Id.* at 7 (citing September 3 Order, 124 FERC ¶ 61,219).

[36] *Id.* at 7-8 (quoting *PJM Interconnection, L.L.C.*, 124 FERC ¶ 61,307, at P 55 (2008)).

[37] *Id.* at 9.

[38] *See supra* note 11.

clearly demands."[39] The courts and the Commission have found that, when the terms of a contract are clear and unambiguous, the terms of the contract control and the Commission is not to consider parol evidence to interpret the contract's intention.[40] Delaware courts also have found that "[t]he applicability of the parol evidence rule also may be triggered by an integration [or merger] clause in the contract."[41] No extrinsic or parol evidence may be used to contradict either total or partial integrated contracts.[42]

26. Under these general principles of law, the Commission must decide whether the parol evidence rule applies. If these provisions of the Transmission Owners Agreement are clear and unambiguous, in accordance with Delaware law and Commission precedent, the parol evidence rule would prohibit consideration of extrinsic evidence to contradict the terms of the agreement. The parol evidence rule also would apply if the Transmission Owners Agreement is an integrated document and no exception to the rule applies, such as allegations of fraud or misrepresentation.[43]

27. To determine whether an agreement is ambiguous, the Commission must look within the four corners of the agreement and not to outside sources.[44] Furthermore, the Commission must review the entire agreement and particular words should be

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[39] *See Hajoca Corp. v. Security Trust Co.*, 25 A.2d 378, 283 (Del. 1942).

[40] *See, e.g., Transmission Agency of N. Cal. v. FERC*, 628 F.3d 538, 547 (D.C. Cir. 2010) (when a contract is unambiguous, that language controls and the court "must give effect to the unambiguously expressed intent of the parties"); *Pac. Gas & Elec. Co.*, 107 FERC ¶ 61,154, at P 19 (2004) (stating "when the language of a contract is explicit and clear . . . then the court may ascertain the intent from its written terms and not go further"); *Mid-Continent Area Power Pool*, 92 FERC ¶ 61,229, at 61,755 (2000) (stating when a contract's terms are clear, it is to be construed according to its literal terms and extrinsic evidence cannot be used to alter or contradict the contract's express terms); *accord Pellaton v. Bank of N.Y.*, 592 A.2d 473, 478 (Del. 1991) (stating when an instrument is clear on its face, the court is not to consider parol evidence to interpret its intentions).

[41] *Addy v. Piedmonte*, 2009 Del. Ch. LEXIS 38, at *29 (Del. Ch. 2009).

[42] *Taylor v. Jones*, 2002 Del. Ch. LEXIS 152, at *3 (Del. Ch. 2002).

[43] *See Anglin v. Bergold*, 565 A.2d 279, 1989 Del. LEXIS 236, at *5-6 (Del. 1989).

[44] *Ophthalmic Surgeons, Ltd. v. Paychex, Inc.*, 632 F.3d 31, 35 (1st Cir. 2011).

considered, not as if isolated from the context, but in the light of the obligations as a whole and the intention of the parties as manifested therein.[45] An agreement is ambiguous where it "could suggest more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business."[46]

28. Upon review, we find that the Transmission Owners Agreement executed by Duquesne is clear and unambiguous as to the first issue the District Court has referred to the Commission, i.e., whether its execution creates a binding obligation to MISO. Duquesne's execution of the Transmission Owners Agreement therefore created a binding and enforceable commitment to MISO. Accordingly, we may not consider the transmittal email, or the regulatory context that Duquesne relies on,[47] to contradict the clear and unambiguous terms of the Transmission Owners Agreement and to find that the Transmission Owners Agreement was conditional.

29. Of particular relevance to this determination, section V.A.2 of Article Two of the Transmission Owners Agreement provides that a MISO member may join as an Owner provided that it, among other things, "agrees to sign this Agreement, to be bound by all of its terms, and to make any and all payments or contributions required by this Agreement." This provision of the Transmission Owners Agreement expresses the intent of the executing party to be bound by the terms of the agreement. Furthermore, section I.B of Article Two provides that: "By agreeing to and executing this Agreement,

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[45] *Id.*

[46] *Bank of N.Y. v. First Millennium, Inc.*, 607 F.3d 905, 914 (2d Cir. 2010).

[47] As noted above, with regard to the regulatory context that Duquesne relies on to show conditionality, we clarify that the Commission's conditional acceptance of the Duquesne/MISO integration plan only relates to their plan to integrate the physical transmission facilities into MISO and has no bearing on Duquesne's decision to join MISO as a transmission owning-member. Moreover, we note that the September 3 Order, 124 FERC ¶ 61,219 at P 73, required Duquesne to give at least 60 days' notice of its firm commitment to withdraw from PJM, "[b]ased on the timing needs presented" in accordance with the RTOs' need to propose a method for handling partial-year auction revenue rights and financial transmission rights. This further supports the notion that the Commission's September 3 Order relates to the Commission's ability to regulate the smooth functioning of the wholesale energy markets and does not determine whether the Transmission Owners Agreement was binding between Duquesne and MISO.

the Owners declare that (i) the Transmission System committed to the operation and control of [MISO], (ii) the Non-transferred Transmission Facilities, and (iii) all revenues from the provision of transmission service provided by [MISO] shall be managed, administered, received, and collected, in the manner and subject to the terms and conditions set forth in this Agreement. . . ." The operative phrase in this provision is "executing this Agreement." This phrase indicates that the execution of the Transmission Owners Agreement creates a binding commitment on the executing party. The relevant language in the Transmission Owners Agreement therefore establishes the binding nature of the agreement as to the executing party upon execution, as discussed above, and the relevant terms of the agreement are clear and unambiguous.[48]

30. Further, we find that the Transmission Owners Agreement is an integrated document. A written document that contains a clause stating that the document is

[48] Duquesne is a sophisticated party with access to competent legal counsel throughout the process of negotiating with MISO. We are therefore not convinced that Duquesne was unaware that it was signing a binding agreement with MISO or that Duquesne did not recognize the risk of attempting to modify the terms of the Transmission Owners Agreement in a document outside of the agreement (i.e., the transmittal email). *See, e.g., J.A. Moore Constr. Co. v. Sussex Associates Ltd. P'ship*, 688 F. Supp. 982, 990-91 (D. Del. 1988) (holding a heavily negotiated contract between sophisticated parties precluded justifiable reliance on representations made outside, or inconsistent with, the controlling agreement). Moreover, "unilateral statements of position uttered before an integrated contract is entered do not become a part of a contract when the party arguing for their inclusion was unable to secure the adoption of the statements in the language of the contract." *Consolidated Gas Supply Corp. v. FERC*, 745 F.2d 281, 289 (4th Cir. 1984).

In this case, by Duquesne's own admission, it was unable to secure the inclusion of the conditional language in the agreement during negotiations with MISO. Duquesne Reply Brief at 4. Thus, we will not read into the agreement the language contained in the transmittal email as placing any condition on the effectiveness of the Transmission Owners Agreement that Duquesne executed in due form.

If Duquesne felt that it could not enter into the agreement without having such language in the agreement and if MISO refused to accept such language in the agreement, then Duquesne should not have executed the Transmission Owners Agreement, but, in fact, it did execute the Transmission Owners Agreement.

intended to be the parties' final agreement creates a presumption of integration.[49] Article Nine, section L (the merger clause) stipulates that the Transmission Owners Agreement, the MISO Tariff, the Agency Agreement, and other documents referenced in the Transmission Owners Agreement constitute the entire agreement.

31. Court and Commission precedent establish that, under these circumstances, we may not consider extrinsic evidence to contradict the terms of the agreement.[50] We therefore will not consider the statement in the transmittal email, or the regulatory context that Duquesne relies on, to demonstrate that the Transmission Owners Agreement was conditional. Under the merger clause, "no previous or contemporary oral or written representations, agreements, or understandings made between any officer, agent, or representative of any Owner shall be binding on any Owner unless contained in this agreement" or other referenced document.[51] While Duquesne's transmittal email included a contemporaneous written representation, i.e., that it intended the Transmission Owners Agreement to bind it only under certain conditions, the merger clause states that such a representation is binding only if it is included in the Transmission Owners Agreement or other referenced document – and it is not. We therefore find that it does not bind Duquesne or its fellow signatories to the Transmission Owners Agreement.

32. Even if the Commission found some ambiguity in the Transmission Owners Agreement, or was otherwise permitted to consider outside evidence, Duquesne's argument that it conditioned its execution of the Transmission Owners Agreement through its email is ultimately unavailing. Under the merger clause, discussed above, any modification must be in writing and part of the Transmission Owners Agreement or other referenced document to be considered effective. That was not done here. A unilateral email by Duquesne not made a part of any such document, and not agreed to by the other parties to the Transmission Owners Agreement, does not change the Transmission

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[49] *See Kronenberg v. Katz*, 872 A.2d 568, 592 n.45 (Del. Ch. 2004); *accord Addy*; 2009 Del. Ch. LEXIS 38 at *29; *Carrow v. Arnold*, 2006 Del. Ch. LEXIS 191, at *16 (Del. Ch. 2006).

[50] *See supra* note 39. Duquesne does not argue, nor do we find, that any exception, such as fraud or misrepresentation, to the parol evidence rule applies. *See, e.g.*, *Anglin*, 565 A.2d 279, 1989 Del. LEXIS 236 at *5-6 (Del. 1989) (finding that parol evidence is admissible where fraud or misrepresentation is alleged).

[51] We observe that the value of the Transmission Owners Agreement, and of MISO itself, would be substantially diluted if any Transmission Owner could unilaterally place conditions upon its membership.

Owners Agreement. Finally, while the transmission owners certainly can enter into an agreement that modifies the terms of the Transmission Owners Agreement, a rate schedule on file with the Commission, any such modifications would still need to be filed with and accepted by the Commission before they would be effective.[52] And that has not happened either.[53]

B. Article Five's Obligation to Pay an Exit Fee

1. Initial Briefs

a. MISO and MISO Transmission Owners

33. In their briefs, MISO and the MISO Transmission Owners argue that section II.B of Article Five of the Transmission Owners Agreement obligates Duquesne to pay an exit fee because Duquesne's execution of the Transmission Owners Agreement created a binding obligation to MISO. MISO Transmission Owners add that, consistent with Article Five of the Transmission Owners Agreement, the exit fee Duquesne owes

[52] 16 U.S.C. § 824d (2006). We further find that it is critical to enforce integration or merger clause provisions in Commission-jurisdictional agreements between transmission owners, such as the merger clause in the Transmission Owners Agreement, to apply the parol evidence rule when appropriate, and to hold the parties to the terms contained in such agreements to ensure consistency and uniformity in the regulation of the industry. *See* 16 U.S.C. § 824d (2006) (terms and conditions of jurisdictional service must be filed with the Commission).

[53] Duquesne's reliance on *Friel*, *inter alia*, to demonstrate that it did not form a binding contract is misplaced. We recognize that, under Delaware common law, acceptance must "mirror" the offer to form a binding agreement, and that a reply to an offer that adds qualifications or requires performance of conditions is not acceptance but is a counteroffer. *Friel*, 206 A.2d at 233-34; *see also* 1 Arthur L. Corbin, Corbin on Contracts § 82 (1963). However, applying the "mirror image rule" of Delaware, and contrary to the facts in *Friel*, we find that MISO did in fact unconditionally accept Duquesne's offer. Duquesne signed and submitted an integrated agreement that included a merger clause that both provided that contemporaneous oral or written statements, such as the transmittal email at issue here, would not be a part of the agreement and also contains an explicit statement that Duquesne agrees to be bound upon execution of the agreement. Based on the terms of the Transmission Owners Agreement, we apply the parol evidence rule and the merger clause to find that Duquesne's offer was limited to the terms of the Transmission Owners Agreement or other referenced documents; the transmittal email was not such a referenced document.

includes a share of the costs recovered under Schedules 10, 16, and 17 of MISO's tariff.[54] MISO Transmission Owners state that a withdrawing transmission owner's obligation to pay an exit fee is not new. In fact, MISO Transmission Owners assert that the Commission obligated Duquesne to pay exit fees in its order approving Duquesne's proposed withdrawal from PJM and indicated that an applicant seeking to withdraw from a regional transmission operator must demonstrate that it will satisfy the terms of the applicant's contractual obligations as they relate to withdrawal.[55]

34. Furthermore, MISO Transmission Owners argue that the Transmission Owners Agreement does not require that Duquesne transfer its facilities to MISO's functional control to be subject to the exit fee provisions. MISO Transmission Owners state that the Transmission Owners Agreement clearly states that the agreement becomes effective, binding, and enforceable as to a transmission owner upon execution, and requires a withdrawing transmission owner to pay all "financial obligations incurred . . . applicable to time periods prior to the effective date of such withdrawal."[56] MISO Transmission Owners state that "[n]othing in the [Transmission Owners] Agreement makes Duquesne's obligation to follow the [Transmission Owners] Agreement any less valid or enforceable simply because it has not transferred functional control of its transmission facilities to MISO."[57]

b. Duquesne

35. Duquesne argues that it is not obligated to pay an exit fee because it never entered into a binding contract with MISO. In the event that the Commission finds that Duquesne's execution created a binding commitment to MISO, Duquesne argues that the Commission should not require it to pay a fee to exit an organization it never joined. Duquesne maintains that it never integrated its operations into MISO and, in fact, it never left PJM. Accordingly, Duquesne argues that PJM, not MISO, exercised exclusive and independent authority over the rates, terms and conditions of access to Duquesne's transmission facilities.[58] Moreover, Duquesne argues that MISO never provided any

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[54] MISO Transmission Owners Initial Brief at 2-3, 15-16.

[55] *Id.* at 17 (citing *Duquesne Light Co.*, 122 FERC ¶ 61,039, at P 92-96 (2008)).

[56] *Id.* (quoting Transmission Owners Agreement, Article One, § I.B; *id.* Article Five, § II.B; *id.* Article Nine, § H.3).

[57] *Id.*

[58] Duquesne Initial Brief at 11-13.

services for Duquesne or its customers and therefore MISO has no claim for any compensation. Duquesne asserts that the purpose of exit fees is not to punish the withdrawing member, but rather to ensure that the regional transmission operator is adequately compensated for fixed costs and to prevent the remaining members from having to pay a greater percentage of costs.[59]

2. Reply Briefs

a. MISO and MISO Transmission Owners

36. MISO Transmission Owners restate their claim that the Commission should require Duquesne to pay an exit fee. They argue that to allow Duquesne to escape its financial obligations under the Transmission Owners Agreement because it failed to follow through on its other obligation under the Transmission Owners Agreement would provide a significant incentive for parties to avoid their contractual obligation simply by breaching their contracts. They also contend that not requiring Duquesne to pay an exit fee could undermine regional transmission operator stability by undercutting the validity of key documents.[60] MISO Transmission Owners argue that Duquesne is a sophisticated entity that willingly signed an agreement requiring it to pay certain fees if it withdrew from MISO. MISO Transmission Owners argue that Duquesne made a business decision not to follow through on its commitment to MISO and paying the applicable fees is not punitive.[61] MISO adds that it enjoys an "A" credit rating, imputed from the average credit rating of its members, because, at least in part, MISO assured the credit rating agencies that it would vigorously enforce the obligations of its members under Article Five of the Transmission Owners Agreement. MISO maintains that its credit rating is vital to providing the lowest cost of service.[62]

3. Commission Determination

37. Because Duquesne is bound to the terms of the Transmission Owners Agreement, as discussed above, we find that Article Five of the Transmission Owners Agreement obligates Duquesne to pay an exit fee. Duquesne made a binding commitment to join

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[59] *Id.* at 13 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 135 FERC ¶ 61,255, at P 18 (2011)).

[60] MISO Transmission Owners Reply Brief at 11-12.

[61] *Id.*

[62] MISO Reply Brief at 14-15.

MISO after Duquesne submitted its application for membership, including the Transmission Owners Agreement and applicable fees, to MISO and after the MISO Board of Directors unanimously approved Duquesne's membership in MISO, both of which, in fact occurred (the latter on August 21, 2008). Thus, Duquesne is bound to pay an exit fee in accordance with Article Five of the Transmission Owners Agreement.[63]

38. While section X.D of Article Two of the Transmission Owners Agreement allows a transmission owner to withdraw from MISO, section I of Article Five provides that such withdrawal shall not "become effective any earlier than five (5) years following the date that the Owner signed this Agreement." Moreover, section II.B of Article Five provides that "[a]ll financial obligations incurred and payments applicable to time periods prior to the effective date of such withdrawal shall be honored by [MISO] and the withdrawing Owner." As further explained below, this requirement includes the obligation to pay a share of costs recovered under Schedules 10, 16, and 17, as well as costs associated with regional cost allocation provided under Attachment FF of MISO's tariff.

39. We find Duquesne's argument that it is not subject to the exit fee provisions of Article Five to be without merit. Completing the process of integrating its transmission facilities is not what triggers the application of Article Five. Rather, the triggering events are the execution of the Transmission Owners Agreement and ultimate acceptance of membership in MISO by MISO's Board of Directors, both of which, in fact occurred (the latter on August 21, 2008). Therefore, we agree with MISO Transmission Owners that there is nothing in the Transmission Owners Agreement that invalidates Duquesne's obligation to pay an exit fee simply because Duquesne had not yet transferred functional control of its transmission facilities to MISO.

C. Just and Reasonable Exit Fee

1. Initial Briefs

a. MISO

40. MISO states that the measure of damages for Duquesne's breach should, in the first instance, at least equal the cost of a contractually authorized withdrawal. MISO asserts that the Transmission Owners Agreement provides a liquidated damages clause

[63] We note that nothing in this order prejudges whether Duquesne can recover any portion of the exit fee in rates. If Duquesne is ultimately found to owe MISO an exit fee, it would then have the option of submitting a filing under section 205 to recover any amount of the exit fee in rates.

under section II.B of Article Five. MISO states that it provided a good faith estimate of Duquesne's obligations under Schedules 10, 16, and 17 that amounted to approximately $7.1 million. MISO also submits that Duquesne should be required to provide $2 million to reimburse MISO for the direct and indirect costs of its efforts to perfect Duquesne's membership request.[64]

2. Reply Briefs

a. MISO

41. While Duquesne did not submit any arguments on this issue in its initial brief, in its reply brief MISO adds to its prior arguments that it incurred significant expenses to begin the process of integrating Duquesne into MISO. MISO states that it, as well as its members, detrimentally relied on Duquesne's representations to MISO. MISO alleges that, while it was striving to integrate Duquesne's facilities, and working hard to satisfy the remaining ministerial concerns, Duquesne was simultaneously shopping the deal to PJM capacity suppliers. Accordingly, MISO maintains that the Commission should hold Duquesne accountable for its breach of contract and require Duquesne to reimburse MISO for its reasonable reliance cost, in addition to the liquidated damages of the exit fee.[65]

b. Duquesne

42. With regard to MISO's claim for reimbursement for the costs associated with MISO's efforts to perfect Duquesne's membership request, Duquesne argues that this claim remains before the District Court as part of MISO's promissory estoppel claim. Duquesne states that MISO filed two counts with the District Court, and the District Court only referred the breach of contract claim to the Commission. Duquesne maintains that only a just and reasonable exit fee falls under the breach of contract claim and that the reimbursement costs fall under the promissory estoppel claim. Duquesne states that the Commission should decline MISO's request to adjudicate the promissory estoppel claim and its related damages. In the event that the Commission does elect to consider this count, Duquesne argues that the Commission does not have sufficient information to rule on these damages because MISO's claimed expenses are just estimates and

[64] *Id.* at 16-18.

[65] MISO Reply Brief at 16-17.

Duquesne should have the right to take discovery from MISO on the nature and timing of those expenses and whether they were incurred in good faith, as alleged by MISO.[66]

3. Commission Determination

43. We find that the parties' briefs regarding a just and reasonable exit fee due to MISO under Article Five of the Transmission Owners Agreement raise issues of material fact that cannot be resolved based on the record before us, and that are more appropriately addressed in the hearing and settlement judge procedures ordered below.

44. Section II.B of Article Five of the Transmission Owners Agreement, the liquidated damages provision to which MISO refers, provides that a withdrawing member must honor "[a]ll financial obligations incurred and payments applicable to time periods prior to the effective of such withdrawal." The Commission explained in *Louisville Gas and Electric*[67] that, under the exit fee provisions in Schedule 10 of the MISO tariff in effect at that time, the withdrawing transmission owner must pay its share of MISO's deferred costs, i.e., the unamortized pre-operating costs and undepreciated capital costs, plus any costs that are not recovered during the initial 6 years of MISO operations.[68] Furthermore, the Commission found that, under the exit fee provisions of Schedules 16 and 17 in effect at that time, the withdrawing transmission owner is required to pay its share of all MISO undepreciated capital expenditures and unamortized deferred costs plus the net interest costs over the remaining life of the debt instrument used to finance the development of the service.[69] Subsequent to the Commission's decision in *Louisville Gas and Electric*, MISO revised these exit fee provisions. The MISO tariff now states that the withdrawing transmission owner's total responsibility under Schedules 10, 16, and 17 upon withdrawal is subject to negotiation between MISO and the withdrawing transmission owner.[70]

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[66] Duquesne Reply Brief at 10-11.

[67] *See supra* note 4.

[68] *Louisville Gas and Electric*, 114 FERC ¶ 61,282 at P 58-59.

[69] *Id.*

[70] Schedules 10, 16 and 17 have essentially identical language that states:

In the event that a Transmission Owner withdraws its transmission facilities ("Withdrawing Entity") from the operational control of the Transmission Provider, the Withdrawing Entity shall pay its share of all Schedule 10-

(continued…)

45. In this case, MISO estimates that Duquesne's financial obligations under Schedules 10, 16, and 17 are $7.1 million, although it has not provided documents supporting this claim. To date, on the other hand, Duquesne maintains that it is not liable under Article Five to pay the exit fee because it is not bound by the Transmission Owners Agreement and, therefore, has not engaged in any negotiations on this matter. MISO also argues that Duquesne should be required to compensate MISO for the direct and indirect costs of MISO's efforts to perfect Duquesne's membership in MISO, which MISO estimates at over $2 million.[71]

46. The liquidated damages provision in the Transmission Owners Agreement does not clearly define the exit fee, and has in the past been resolved through negotiations between the parties. Because MISO has not presented sufficient evidence to support its $7.1 million figure, we set the issue of a just and reasonable exit fee for hearing and settlement judge procedures. With regard to MISO's request for reasonable reliance costs in addition to the exit fee under Article Five, we find that MISO's request is beyond the scope of this proceeding. The District Court only seeks the Commission's guidance on a just and reasonable exit fee under Article Five of the Transmission Owners Agreement and the Order Establishing Briefing Procedures confined the Commission's examination to such charges.[72] We will not expand the scope of this proceeding to include any damages outside Article Five of the Transmission Owners Agreement.

47. While we are setting these matters for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their disputes before hearing procedures are commenced. To aid the parties in their settlement efforts, we will hold the hearing in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.[73] If the parties desire, they may,

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> related [Schedule 16-related or Schedule 17-related] financial obligations incurred and payments applicable to time periods prior to the effective date of such withdrawal (the "Schedule 10 [16 or 17] Withdrawal Obligation") as required by Article Five, Section II(B) of the ISO Agreement. The Withdrawing Entity's total responsibility for the Schedule 10 [16 or 17] Withdrawal Obligation shall be based on the outcome of a negotiated or contested settlement accepted by the Commission.

[71] MISO Initial Brief at 18.

[72] Order Establishing Briefing Procedures, 135 FERC ¶ 61,237 at P 9, 19, 21.

[73] 18 C.F.R. § 385.603 (2011).

by mutual agreement, request a specific judge as a settlement judge in the proceeding; otherwise the Chief Judge will select a judge for this purpose.[74] The settlement judge shall report to the Chief Judge and the Commission within thirty (30) days of appointment of the settlement judge concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions or provide for the commencement of a hearing by assigning the case to a presiding judge.

The Commission orders:

(A) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and by the Federal Power Act, particularly sections 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and regulations under the Federal Power Act (18 C.F.R. Chapter I), a public hearing shall be held concerning a just and reasonable exit fee due to MISO from Duquesne under Article Five of the Transmission Owners Agreement, as discussed in the body of this order. However, the hearing will be held in abeyance to give the parties time for settlement judge procedures, as discussed in Ordering Paragraphs (B) and (C) below.

(B) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2010), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within fifteen (15) days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge within five (5) days of the date of this order.

(C) Within thirty (30) days of the appointment of the settlement judge, the settlement judge shall file a report with the Commission and the Chief Judge on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every

[74] If the parties decide to request a specific judge, they must make their request to the Chief Judge by telephone at 202-502-8500 within five (five) days of the date of this order. The Commission's website contains a list of Commission judges available for settlement proceedings and a summary of their background and experience (http://www.ferc.gov/legal/adr/avail-judge.asp).

sixty (60) days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

(D) If the settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Chief Judge, shall, within fifteen (15) days of the date of the presiding judge's designation, convene a prehearing conference in these proceedings in a hearing room of the Commission, 888 First Street, NE., Washington, DC 20426. Such a conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates and to rule on all motions (except motions to dismiss), as provided in the Commission's Rules of Practice and Procedure.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.